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No. 88-1552

In the Supreme Court of the United States

OCTOBER TERM, 1988

WASHINGTON INTERNATIONAL INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Amendment right to trial by jury applies in an action against the United States for the recovery of customs duties under 28 U.S.C. 1581(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 863 F.2d 877. The opinion of the United States Court of International Trade (Pet. App. C1-C48) is reported at 678 F. Supp. 902. The opinion of the United States Court of International Trade granting petitioner's motion to convene a three-judge panel (Pet. App. B1-B10) is reported at 659 F. Supp. 235.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1989. The petition for a writ of certiorari was filed on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1978, a load of white feta cheese imported from Cyprus arrived in Chicago, Illinois. The United States Customs Service appraised and liquidated the merchandise in 1980 at an export value of $160,000. As the importer's surety, petitioner Washington International Insurance Company paid the liquidated duties and protested the appraisal under 19 U.S.C. 1514, contending that the Customs Service should have appraised the cheese, which had arrived in a damaged condition, at the salvage price of $7,406.08. The Customs Service denied petitioner's protest on the ground that the importer had not filed a timely claim for a refund. Thereafter, in December 1982, petitioner filed an action under 28 U.S.C. 1581(a)[1] against the United States in the United States Court of International Trade, renewing its challenge to the Customs Service's assessment of the duties. Petitioner's complaint included a demand for trial by jury. Pet. App. A1, B3-B4, C3-C4.

The United States moved to strike petitioner's demand for a jury trial. The government contended, among other claims, that neither the Seventh Amendment nor the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, provides a right to jury trial in actions against the United States within the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). Petitioner responded that the Seventh Amendment guaranteed a right to jury trial because, at the time the Amendment was adopted in 1791, the common law recognized the right to

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[1] Section 1581(a) provides that

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

jury trial in actions against government customs collectors to recover excessive duty payments. In addition, petitioner maintained that Congress, in enacting 28 U.S.C. 1876(a) as part of the Customs Courts Act of 1980,[2] intended to provide jury trials in actions filed against the government in the Court of International Trade under 28 U.S.C. 1581(a).[3]

2. The Court of International Trade, in a divided opinion, denied the government's motion to strike petitioner's demand for a jury trial, holding that the Seventh Amendment right to trial by jury applies in an action against the United States for the recovery of customs duties under 28 U.S.C. 1581(a) (Pet. App. C1-C48).[4] The court recognized that at common law, in both England and the United States in the late eighteenth century, the customs collector was personally liable for the refund of excessive duties, and that actions seeking such refunds were tried to juries. Pet. App. C7-C8. It reasoned that, when Congress enacted the Customs Administration Act of 1890, ch. 407, 26 Stat. 131, it merely substituted de-

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[2] Section 1876(a) provides that

> [i]n any civil action in the Court of International Trade which is to be tried before a jury, the jury shall be selected in accordance with the provisions of this chapter and under the procedures set forth in the jury selection plan of the district court for the judicial district in which the case is to be tried.

[3] Petitioner also filed a motion to convene a three-judge panel under 28 U.S.C. 255(a) and Rule 77(d)(2) of the Rules of the Court of International Trade. Over the government's opposition, Chief Judge Re granted petitioner's motion. Pet. App. B1-B10.

[4] The court, together with Chief Judge Re in dissent, rejected petitioner's claim that Congress, in enacting 28 U.S.C. 1876(a) as part of the Customs Courts Act of 1980, specifically intended to provide for jury trials in actions against the government seeking refunds of customs duties under 28 U.S.C. 1581(a). Pet. App. C4-C6, C34.

fendants, namely the United States for the customs collector, and did not change the essential nature of the refund action. Pet. App. C24-C30.[5] In the court's view, "since the statutory action merely codifies a right that was known at a common law, the right to trial by jury must be preserved" (*id.* at C30 (internal quotation marks and citation omitted)).

The court also relied on *Tull* v. *United States*, 481 U.S. 412 (1987). There, in holding that the Seventh Amendment right to jury trial applied in an action by the government against a private party for civil penalties and injunctive relief under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, this Court stated that "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Tull*, 481 U.S. at 421 (quoting *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974)). Here, since the relief sought by petitioner was based on an action in debt, an action triable at common law before a jury, the court reasoned that under this Court's analysis in *Tull*, the Seventh Amendment right to jury trial applies in petitioner's action against the government. Pet. App. C32-C33.

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[5] The common law practice holding the customs collector personally liable for the refund of excessive duties remained essentially unchanged until Congress enacted the Customs Administration Act of 1890. That Act revamped the common law practice in several ways: (1) by repealing the existing statute providing a cause of action against the collector, with its concomitant statutory right to trial by jury; (2) by creating the Board of General Appraisers, which would exercise exclusive jurisdiction, without jury trials, over all customs disputes regarding the classification and appraisal of merchandise; and (3) by waiving the government's sovereign immunity from suit for such refund actions, thereby making the United States, as opposed to the customs collector, the defendant in those actions. See Pet. App. C39-C45.

Chief Judge Re dissented (Pet. App. C34-C48). In his view, the majority mistakenly ignored the well-settled principles that " 'the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government' " (*id.* at C34-C35, quoting *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981)), and that "a plaintiff has a right to trial by jury [in such actions] only if Congress 'has affirmatively and unambiguously granted that right by statute' " (Pet. App. at C35 (quoting *Lehman* v. *Nakshian*, 453 U.S. at 168)).[6] Reviewing the relevant statutory scheme, the Customs Administration Act of 1890, together with its legislative history, Chief Judge Re found that Congress had not specifically provided a right to jury trial. On the contrary, "Congress consciously, deliberately, and with full awareness of its constitutional implications, repealed the statute allowing an action against a collector, with its concomitant statutory right to trial by jury before the courts" (Pet. App. C39). In its place, Congress "substituted a 'radically' new statutory system for an action against the United States before a newly established Board of General Appraisers. The new system intentionally removed the right to a jury trial before the courts, and 'substituted' a trial before the general appraisers" (*ibid.*); see *id.* at C39-C45 (detailing legislative history).

3. Under 28 U.S.C. 1292(d)(1), the Court of International Trade certified its decision for immediate appeal. The court of appeals granted the government's request to take an interlocutory appeal. Pet. App. A2.

4. The court of appeals unanimously reversed, holding that the Seventh Amendment right to trial by jury does

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[6] He also criticized the majority's reliance on *Tull* v. *United States*, *supra*, since that case involved an action brought by the United States rather than an action filed against the government. Pet. App. C36-C37.

not apply in an action against the United States for the recovery of customs duties under 28 U.S.C. 1581(a) (Pet. App. A1-A4).[7] The court acknowledged that the Seventh Amendment "preserves the right to a jury trial in those actions in which the right existed at common law when the amendment was adopted in 1791" (*id.* at A3). Citing *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), and *Galloway* v. *United States*, 319 U.S. 372, 388-389 (1943), the court of appeals concluded, however, that "[a]n action *against* the government * * * is not a suit at common law within the purview of the Seventh Amendment" (Pet. App. A3 (emphasis in original)).

Finally, the court of appeals rejected the contention that *Tull* v. *United States, supra*, called for any modification of this Court's settled Seventh Amendment precedents involving actions against the government. Those decisions, based on principles of sovereign immunity, made clear that actions against the United States are not common law suits within the meaning of the Seventh Amendment. As the court explained, "[b]ecause actions *against* the government are not analogous to actions *by* the government, *Tull* does not require the Court of International Trade to grant [petitioner's] jury demand" (Pet. App. A4 (emphases in original)).

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[7] The court of appeals also agreed with the Court of International Trade that Congress, in enacting 28 U.S.C. 1876(a) as part of the Customs Courts Act of 1980, did not specifically intend to provide for jury trials in actions against the government seeking refunds of customs duties under 28 U.S.C. 1581(a). Pet. App. A2-A3. Petitioner has not sought further review of this aspect of the court of appeals' judgment.

ARGUMENT

The decision of the court of appeals is a correct application of the Seventh Amendment and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner renews its contention (Pet. 9-14) that the Seventh Amendment right to trial by jury applies in an action against the United States for the recovery of customs duties under 28 U.S.C. 1581(a). But, as this Court recently reiterated in *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *E.g., Galloway* v. *United States*, 319 U.S. at 388-389; see *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). As this Court observed in *Galloway* v. *United States*, 319 U.S. at 388-389 (footnote omitted)):

> The suit is one to enforce a monetary claim against the United States. It can hardly be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.

This established construction of the Seventh Amendment is but a particular application of the general principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); accord *Lehman* v. *Nakshian*, 453 U.S. at 160; see *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Accordingly, as this Court has made plain,

"the plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." *Lehman* v. *Nakshian*, 453 U.S. at 168; see *United States* v. *Testan*, 424 U.S. at 399.[8]

Both the Court of International Trade and the court of appeals correctly found that Congress, from its enactment of the Customs Administration Act of 1890 through passage of the Customs Courts Act of 1980, has never authorized jury trials in actions against the United States seeking recovery of customs duties. See Pet. App. C4-C6, C34, A2-A3.[9] That conclusion is consistent with this Court's recognition that Congress' "normal practice [has been] not [to] provid[e] a right to trial by jury when it [has] waived the sovereign immunity of the United States." *Lehman* v. *Nakshian*, 453 U.S. at 168-169.[10] Petitioner no

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[8] The Court further observed in *Lehman* v. *Nakshian*, 453 U.S. at 160-161 (internal quotation marks and citations omitted; brackets in original), that the plaintiff

> has a right to a trial by jury only where that right is one of the terms of [the Government's] consent to be sued. * * * Like a waiver of immunity itself, which must be unequivocally expressed, * * * this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.

[9] Petitioner had purported to find a statutory authorization for jury trials in 28 U.S.C. 1876(a). See note 2, *supra*. But, as the court of appeals explained succinctly, that provision "does not specify which actions entitle parties to jury trials, but rather sets forth the procedures to be followed when a Court of International Trade action is tried before a jury" (Pet. App. A2). By its terms, therefore, Section 1876(a) "does not affirmatively and unambiguously grant [petitioner] a trial by jury in this action against the United States" (*id.* at A3).

[10] In fact, Congress has departed from this practice only once in recent times, when it amended 28 U.S.C. 2402 in 1954 to permit jury trials in tax refund suits in district court under 28 U.S.C. 1346(a)(1).

longer challenges this resolution of the statutory issue. Consequently, in light of this Court's longstanding construction of the Seventh Amendment as applied to actions against the government, petitioner's constitutional claim necessarily collapses.[11]

2. In light of the foregoing, there is no basis for petitioner's contention (Pet. 7-9, 12) that the court of appeals'

See Act of July 30, 1954, ch. 648, § 2(a), 68 Stat. 589. The House Committee observed that the legislation would establish a "wholly new precedent" because "for the first time jury trials would be permitted in suits against the Government." H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953).

[11] Petitioner criticizes (Pet. 13-14) the court of appeals' adherence to decisions such as *Lehman* v. *Naksian, supra*, on the ground that principles of sovereign immunity should not control whether the Seventh Amendment right to jury trial applies in an action for the refund of customs duties. In support of its criticism, petitioner cites Justice Scalia's article, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Actions: Some Conclusions from the Public Land Cases*, 68 Mich. L. Rev. 867 (1970). First, this Court has long maintained that principles of sovereign immunity apply to citizens' disputes with the government over the assessment and collection of customs duties. See, *e.g.*, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 126-127 (1869); *Cary* v. *Curtis*, 44 U.S. (3 How.) 235, 245 (1845). In light of this established precedent and the Court's adherence to the view that the Seventh Amendment right to jury trial does not apply in actions against the government, petitioner's challenge to the court of appeals' decision is groundless. Second, Justice Scalia, in his article, did observe that in the late eighteenth century, private litigants brought common law actions against customs collectors and those suits were tried to juries. See 68 Mich. L. Rev. at 915-916 n.222. That historically accurate observation shows that since the early years of our nation's history, illegal customs assessments would not escape judicial review solely on the ground of sovereign immunity. In that article, however, Justice Scalia had no occasion to address the issue petitioner presents here, namely, whether the Seventh Amendment right to trial by jury applies in a statutory action against the government itself for the refund of customs duties.

decision conflicts with *Tull* v. *United States, supra*. As the court of appeals correctly observed (Pet. App. A3), *Tull* involved an action *by* (rather than *against*) the United States seeking to recover civil penalties. In those circumstances, this Court simply had no reason to consider the application of the government's sovereign immunity to the Seventh Amendment right to jury trial. The Court in *Tull* did not at all purport to overrule established precedent, most recently reaffirmed in 1981 in *Lehman* v. *Nakshian*, 453 U.S. at 160, that the Seventh Amendment right to trial by jury does not apply in suits filed against the United States, where the government's waiver of sovereign immunity did not expressly confer a right to jury trial. See *Galloway* v. *United States*, 391 U.S. at 388-389; *McElrath* v. *United States*, 102 U.S. at 440.[12]

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[12] Petitioner suggests in passing that the court of appeals' decision is inconsistent with *United States* v. *New Mexico*, 642 F.2d 397, 401 (10th Cir. 1981), where the court of appeals stated that "the right of a taxpayer to a jury trial in refund cases is rooted in the common law and was preserved by the Seventh Amendment." Any inconsistency, however, is illusory. First, that statement is dictum since that case involved an action filed by, not against, the United States. See 642 F.2d at 398-399. Second, this Court has already explained, in *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 (1927), that "the right of the petitioner to a jury [in a taxpayer suit against the United States] * * * is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from [the applicable statute]." Accord *Phillips* v. *Commissioner*, 283 U.S. 589, 599 n.9 (1931). Indeed, in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), decided three months after the Tenth Circuit's decision in *United States* v. *New Mexico*, this Court confirmed that jury trials in taxpayer refund actions can only be maintained when Congress explicitly waives the sovereign immunity of the United States and, in that waiver, expressly provides for jury trials. 453 U.S. at 161 n.8.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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